Pacheco v. El Habti, ___ F.4th ___, 2022 WL 4242131 (10th Cir. Sept. 15, 2022)

- **Holding:** *McGirt* did not recognize a new rule of constitutional law and, therefore, was not retroactive for purposes of applying the one-year Antiterrorism and Effective Death Penalty Act's limitations period.
- **Summary:** Petitioner Pacheco was convicted of first-degree child-abuse murder under Oklahoma law in 2014. She is a member of the Keetoowah Band of the Cherokee Nation, and the offense occurred within the historic boundaries of the Cherokee Nation Reservation—i.e., within Indian country as defined in 18 U.S.C. § 1151. She thereafter unsuccessfully appealed her conviction and, equally unsuccessfully, sought federal habeas corpus relief under 28 U.S.C. § 2254 on insufficient-evidence and ineffective-assistance-of-counsel grounds. New vistas of possible relief, however, opened after the Tenth Circuit issued its opinion in *Murphy v. Royal*, 875 F.3d 896, which the Supreme affirmed in light of *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *See Sharp v. Murphy*, 140 S. Ct. 2412 (2020). Petitioner sought, in practical effect, to amend her habeas corpus relief petition to add (prior to *McGirt*) a *Murphy*-based claim, but the federal district court denied (also prior to *McGirt*) the request because it did not grow out of "a common 'core of operative facts'" with the petition's other claims and thus did not relate back to the original filing date of the habeas petition. The absence of such relation-back rendered the proposed claim untimely under AEDPA's one-year limitation period. The Tenth Circuit granted a certificate of appealability as to the timeliness issue.

  Petitioner raised two issues on appeal: "(1) that the time bar to her jurisdictional claim should be excused under the actual-innocence exception and, alternatively, (2) that the statute of limitations reset when the Supreme Court declared the underlying law in *McGirt v. Oklahoma*, ... rendering timely her request to amend." The panel rejected both contentions. As to the first, it held that only factual, not legal, innocence qualifies under that exception to the one-year limitation period. As the panel explained, "only factual innocence turns on the moral culpability of the defendant. And it is this moral dimension that engages our equitable sensibilities." As to the second, the panel was not persuaded "that *McGirt* announced a new rule of constitutional law and that we should make that rule retroactively applicable." It deemed the "fatal flaw" in her position the fact that "*McGirt* announced no new constitutional right. It self-professedly resolved a question of 'statutory interpretation,' ... surveying many 'treaties and statutes[]' ... to determine that '[t]he federal government promised the Creek a reservation in perpetuity' and 'has never withdrawn the promised reservation[.]'"
- **Relevant (2022) Deskbook Section:** 4:9 n.13
- **Comment:** This opinion, together with decisions from the Oklahoma court of criminal appeals, closes the door on *McGirt*'s application to convictions not on direct appeal or to otherwise timely-filed habeas petitions under § 2254 that do not include a claim that the state court lacked jurisdiction because the offense occurred in Indian country and the offender was an Indian.